

## ITEMS OF INTEREST

May 14, 2010

- 1) Board's voice mailbox:  
A. Voice mail for Mr. Hawk.  
B. Voice mail property maintenance complaint.
- 2) IMPORTANT NOTES: Attached is a schedule of upcoming meeting dates.
- 3) FC membership counts will be provided on a monthly basis.
- 4) On Monday, 5/17 the Board will hold its scheduled business meeting. The LPTA will meet at 6:00 p.m. on 5/25. Road Tour will be held on 6/1, beginning at 4:00 p.m.
- 5) Representative Marsico has requested that the Board of Supervisors prepare and submit a grant application under the Dauphin County Local Share Program, requesting funds for Heroes Grove Memorial. Please let me know your thoughts regarding this request.
- 6) Linglestown Road Phase II construction began on 5/10. One problem encountered, that had not been properly addressed in advance, was collection of trash and recyclables. Properties on the south side of Linglestown Road were not collected on 5/10 due to the detour. To resolve this matter, Waste Management will collect all waste from Raspberry Alley, for those properties east of 5933 Linglestown Road. West of this address, where there is no alley access, residents will be asked to take their waste to the opposite side of Linglestown Road. Waste Management will use a small packer truck to run the alley, given low hanging utility wires, tight clearances between utility poles, and narrow turning radii at several locations. Since Waste Management does not have a small recycling truck, recyclables will be picked up by the crew of the small packer and, as such, there will be no recycling materials from properties receiving alley collection.

All affected properties will receive a telephone call from Waste Management regarding this change in collection. In addition, Township staff delivered an informational flyer to all affected properties on today's date.

- 7) Attached is correspondence from Steve Howe, Director of the Dauphin County tax assessment office, regarding Township real estate taxes for Colonial Country Club. Mr. Howe has indicated that 2008 taxes were paid without penalty and interest.
- 8) On today's date, Jeff Case, Sam Robbins, and I met with Eric Kessler regarding his storm water concerns. Specifically, Mr. Kessler believes that, due to the installation of new storm sewer piping in Linglestown Road, surface flow is now being directly injected into a stream that traverses his farm. The stream is now backing up due to the increased peak flow and forming a new wetland area. Mr. Kessler is adamantly opposed to the creation of new wetlands on his property. As part of our meeting, staff discussed with Mr. Kessler the changes that have occurred on his property,

since he has owned it and before the Village of Linglestown project began. Mr. Kessler did acknowledge that changes have occurred, but he still believes that there is more rapid deposit of water onto his property resulting in undesired ponding.

After discussing the problem, as asserted by Mr. Kessler, we discussed potential solutions. Mr. Kessler was reasonable in his requests for mediation and we agreed to investigate several alternatives. Part of this investigation will require input from Dauphin County Soil Conservation Service (DC SCS), which Mr. Robbins will coordinate. I informed Mr. Kessler that we will evaluate the discussed alternatives, contact DC SCS, and arrange a second meeting with him in two weeks.

- 9) Mr. Kessler also reported to me that he has met with Sherri Minimum regarding the opening of Raspberry Alley west of N. Mountain Road. After a lengthy discussion with Ms. Minimum, Mr. Kessler is confident that she will not oppose the acceptance and improvement of this alley by the Township.
- 10) Staff has encountered a technical issue in regard to the acceptance of Raspberry Alley as a public street. This alley is only 14 feet in width. To accept a platted right-of-way by ordinance as public, the 2<sup>nd</sup> Class Township Code requires the width to be at least 15 feet. Mr. Stine is researching this matter and will provide additional guidance during the 5/17 executive session.
- 11) Attached is a proposed settlement of a tax assessment appeal for the Sears property. The Solicitor for the Dauphin County Board of Assessment Appeals is requesting consent from the Supervisors to enter into the proposed settlement.
- 12) Eric Epstein's appeal before the PA Environmental Hearing Board regarding DEP's lack of enforcement against Richard Pleasants' McIntosh Road Baltimore Tar property has been dismissed (see attached).

Please contact me with questions or additional information needs.

## **IMPORTANT MEETINGS FOR THE BOARD OF SUPERVISORS:**

**Supervisors** Business Meetings - 5/17 (Monday); 6/1 & 6/15; 7:30 p.m.

**Supervisors** Workshop Meeting - 6/8; 6:00 p.m.

*(a light meal will be available at 5:30 p.m.)*

Road Tour - 6/1; 4:00 p.m.

South Central EMS Meeting with LPT to be scheduled.

Audit Committee - to be scheduled.

Friendship Operating Board - 6/14; 7:00 a.m. (at the FC)

Village of Linglestown Committee - 5/20; 7:00 p.m. (Old Fire Hall).

LPTA - 5/25; 6:00 p.m. *(a light meal will be available at 5:30 p.m.)*

Heroes Grove Committee - 5/26; 9:00 a.m. room 176 LPT Municipal Center

## VOICE MAIL AND E-MAIL INDEX

5/07/10 through 05/14/10

The new phone number for BOS voice mail is 724-8327

- 5/7 Voice mail message from Attorney Samuel T. Cooper, 236-4812. Wanted to speak with Mr. Hawk. ***Forwarded message to Mr. Hawk.***
- 5/8 Voice mail message from Sandra Ray, 364-7970, wanted to report a dangerous condition, as result of the high winds, to the flag pole behind the Jiffy Lube on Route 22. ***Referred to Mr. Shoaff who found that the repairs had already been made.***
- 5/9 No voice mail or email messages.
- 5/10 No voice mail or email messages.
- 5/11 No voice mail or email messages.
- 5/12 No voice mail or email messages.
- 5/13 No voice mail or email messages.
- 5/14 No voice mail or email messages.

# DAUPHIN COUNTY

## OFFICE OF TAX ASSESSMENT

DAUPHIN COUNTY ADMINISTRATION BUILDING  
2 SOUTH SECOND STREET, SECOND FLOOR  
P.O. Box 1295  
HARRISBURG, PA. 17108-1295  
(717) 780-6101  
(717) 780-6484 FAX

BOARD OF COMMISSIONERS  
JEFFREY T. HASTE, CHAIRMAN  
DOMINIC D. DIFRANCESCO, VICE CHAIRMAN  
GEORGE P. HARTWICK, SECRETARY

CHIEF CLERK/CHIEF OF STAFF  
CHAD SAYLOR

DIRECTOR  
STEVEN L. HOWE, CPE

May 12, 2010

**RECEIVED**

MAY 13 2010

George Wolf, Township Manager  
Lower Paxton Township  
425 Prince Street  
Harrisburg, PA 17109

LOWER PAXTONTWR

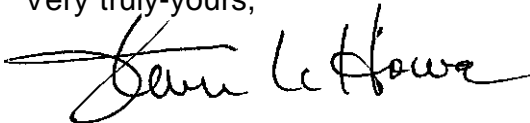
RE: Crown Club LP  
Property ID 35-014-010-000-0000

Dear Mr. Wolf:

The 2008 Lower Paxton real property tax for the above referenced parcel was paid November 6<sup>th</sup> 2009 in the amount of \$3,487.05 and distributed to the township in December 2009. The amount paid and distributed represents the flat tax levy. As of this date, the interest and penalty has been removed from the docket of the Tax Claim Bureau. It is my understanding that the township plans no further action.

If you have comments or questions, contact me.

Very truly-yours,



Steven L. Howe, CPE  
Director

Cc: Holly Martz, Deputy Director, Dauphin County Tax Claim Bureau (via email)  
Karen McConnell, Business Manager, Central Dauphin School District (via email)  
Mark X. DiSanto, CEO, Triple Crown Corporation (via email)  
F. R. Martsolf, Esquire (via email)

# SHAFFERfcENGLE

## LAW OFFICES,LLC

\* ALLEN SHAFFER, ESQUIRE  
1925-2009

JEFFREY B. ENGLE, ESQUIRE  
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:date<StShafferengle.com

ALEXIS M. MITKOSZEWSKI, ESQUIRE  
• [alexis@shafferengle.com](mailto:alexis@shafferengle.com)

April 26, 2010

### Central Dauphin School District

Stephanie DiVittore, Esquire  
Rhoads & Sinon LLP  
PO Box 1146  
Harrisburg, PA 17108-1146

### Lower Paxton Township

Steven A. Stine, Esquire  
23 Waverly Drive  
Hummelstown, PA 17036

### County of Dauphin

William T. Tully, Esquire  
Solicitor, County Government Center  
Two South Market Square  
P.O. Box 1295  
Harrisburg, PA 17108-1295

**RE: Sears, Roebuck & Co./Algon Realty Co.**  
**Docket No. 0007-CV-H403-TX**  
**Tax Parcel: 35-037-005**  
**a/k/a Colonial Park Sears**

Dear Folks:

Please find enclosed herein a Stipulation for review and signature. As you can see from the dates on the Stipulation, this matter has been "kicking around" from quite some time. It was originally appealed in 2007 and there were various communications back and forth between Appellant's counsel and our prior Solicitor, Carl Wass. I will note that all taxing districts previously ratified this agreement, with the exception of the School District, It is my understanding that the School District will now ratify the agreement,

There are two appraisals in this matter, one conducted by the Appellant in which their appraiser has opined that the property's fair market value as of December 1, 2007, was \$5,800,000. Our appraiser, Pat Noone, conducted his appraisal and opines that the value as of September 1, 2007, is \$10,800,000.

**Sears, Roebuck & Co./Algon Realty Co.**  
**Docket No. 2007-CV-11403-TX**  
**Tax Parcel: 35-037-005**  
**April 26, so 10**  
**Page 2 of2**

After lengthy discussions and prior appraisals by the various taxing boards, the parties are still willing to agree to a fair market value as of January i, 2008, of \$10,150,000.

I would respectfully request that you discuss this with your Boards and sign where indicated. You may return your executed signature page to me at my Millersburg office. Once I have all the signatures in counterpart, I will file the document with the Prothonotary's office,

Very truly yours,

**SHAFER & ENGLE LAW OFFICES, LLC**

  
Jeffrey B. Engle, Esquire

JBE/mew  
Enclosure  
Copy: Steve Howe (w/enc.)

SEARS, ROEBUCK & CO./ALGON REALTY CO.,  Petitioner  vs.  BOARD OF ASSESSMENT APPEALS, Respondent	IN THE COURT OF COMMON PLEAS DAUPHIN COUNTY, PENNSYLVANIA  NO. 2007-CV-11403-TX Tax Parcel No. 35-037-005  CIVIL ACTION - LAW
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**STIPULATION AND JOINT MOTION FOR AGREED ORDER**

AND NOW, this\_\_\_\_\_day of\_\_\_\_\_, 2010, it is hereby stipulated and agreed by and between Sears Roebuck & Co./Algon Realty Co., PETITIONER/APPELLANT, and the RESPONDENT/APPELLEE, Dauphin County Board of Assessment Appeals, and the affected TAXING BODIES, to wit: Lower Paxton Township, Central Dauphin School District, and the County of Dauphin, that the parcel of real estate which is the subject of the instant appeal (Parcel No. 35-037-005, having an assigned street address of 4600 Jonestown Road, Harrisburg) shall have the market value as of August 1, 2007, and August 1, 2008, hereinafter set forth, to wit:

1. Tax Parcel No. 35-037-005

Land	\$2,740,500
Improvements	<u>\$7,409,500</u>
Total Market Value	\$ 10,150,000



2. Further, in view of the fact that the State Tax Equalization Board has certified the common level ratio for Dauphin County to be .713 for appeals filed after July 1, 2007, the said common level ratio does apply to pending appeals, and it is stipulated that the assessment for the aforesaid parcel, effective January 1, 2008, and thereafter, until changed in accordance with law, is as follows:

Tax Parcel No. 35-037-005

Land	\$1,954,000
Improvements	<u>\$5,283,000</u>
Total Assessment	\$7,237,000

3. Further, in view of the fact that the State Tax Equalization Board has certified the common level ratio for Dauphin County to be .685 for appeals filed after July 1, 2008, the said common level ratio does apply to pending appeals, and it is stipulated that the assessment for the aforesaid parcel, effective January 1, 2009, and thereafter, until changed in accordance with law, is as follows:

Tax Parcel No. 35-037-005

Land	\$1,877,200
Improvements	<u>\$5,075,600</u>
Total Assessment	\$6,952,800

4. Further, in view of the fact that the State Tax Equalization Board has certified the common level ratio for Dauphin County to be .705 for appeals filed after July 1, 2009, the said common level ratio does apply to pending appeals, and it is stipulated that the assessment for the aforesaid parcel, effective January 1, 2010, and thereafter, until changed in accordance with law, is as follows:

Tax Parcel No. 35-037-005

Land	\$1,932,100
Improvements	<u>\$5,223,700</u>
Total Assessment	\$7,155,800

**WHEREFORE**, based upon the within Stipulation, counsel hereunder respectfully move  
Your Honorable Court enter the attached, proposed Order, in accordance herewith.

Philip J. Giannuario, Esquire  
Garippa, Lotz & Giannuario  
66 Park Street  
Montclair, NJ 07042  
(973)744-1688  
Attorney ID No. 42873  
Attorney for Appellant

Jeffrey B. Engle, Esquire #76644  
Solicitor, Dauphin County Board of  
Assessment Appeals  
512 Market Street  
MiUersburg, PA 17061  
717-692-2345  
Attorney for Appellee, Dauphin County Board  
of Assessment Appeals

Consent to Stipulation by Non-Parties:

**Lower Paxton Township**

By: \_\_\_\_\_  
Steven A. Stine, Esquire  
23 Waverly Drive  
Hummelstown, PA 17036  
717-903-1268

**Central Dauphin School District**

By: \_\_\_\_\_  
Stephanie DiVittore, Esquire  
Rhoads & Sinon LLP  
PO Box 1146  
Harrisburg, PA 17108-1146  
717-233-5731

**County of Dauphin**

By: \_\_\_\_\_  
William T. Tully, Esquire  
Solicitor, County Government Center  
Two South Market Square  
P.O. Box 1295  
Harrisburg, PA 17108-1295  
(717)780-6301

**RECEIVED**

MAY 14 2010

**LOWER PAXTON TWR**

COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD

2ND FLOOR - RACHEL CARSON STATE OFFICE BUILDING  
400 MARKET STREET, P.O. BOX 8457  
HARRISBURG, PA 17105-8457

(717) 787-3483  
TELECOPIER (717) 783-4738  
<http://ehb.courtapps.com>

MARYANNE WESDOCK, ESQUIRE  
ACTING SECRETARY TO THE BOARD

**ERIC JOSEPH EPSTEIN**

v.

**EHB Docket No. 2008-319-L**

**COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION and RUSSELL STANDARD  
CORPORATION**

**Issued: April 30, 2010****ADJUDICATION****By Bernard A. Labuskes, Jr., Judge****Synopsis**

The Board dismisses an unsubstantiated appeal from the Department's approval of a Final Report submitted pursuant to Act 2.

**FINDINGS OF FACT****Stipulated Facts<sup>1</sup>**

1. The Department of Environmental Protection (the "Department") is the agency with the duty and authority to administer and oversee the implementation of the Land Recycling and Environmental Remediation Standards Act, 35 P.S. §§ 6026.101 *et seq.* ("Act 2"), and the rules and regulations promulgated thereunder. (Joint Stipulation paragraph ("Stip.") 1.)

<sup>1</sup> The stipulated facts are taken from the joint stipulation of facts and exhibits of the Department and Epstein. The recipient of the Department's approval, Russell Standard Corporation, did not participate in this appeal.



2. Eric Joseph Epstein resides at 4100 Hillsdale Road, Harrisburg, PA 17112. (Stip. 2.)
3. The property that is the subject of this appeal is located at 4010 McIntosh Road, Lower Paxton Township, Harrisburg, Dauphin County. (Stip. 3.)
4. The property is owned by Russell Standard Corporation ("Russell"). (Stip. 4.)
5. On November 29, 2005, Russell submitted a Notice of Intent to Remediate ("NIR") pursuant to Act 2 for the property. Russell proposed meeting Act 2 Statewide Health Standards for soils on a portion of the property. (Stip. 5.)
6. Notice of receipt of the 2005 NIR was published in the *Patriot News* on November 23, 2005. (Stip. 6.)
7. Notice of receipt of the 2005 NIR was published in the *Pennsylvania Bulletin* on December 17, 2005. (Stip. 7.)
8. On March 13, 2006, Russell submitted a Final Report pursuant to Act 2 for a portion of the property. (Stip. 8.)
9. Notice of receipt of the Final Report was published in the *Patriot News* on February 8, 2006. (Stip. 9.)
10. Notice of receipt of the Final Report was published in the *Pennsylvania Bulletin* on April 1, 2006. (Stip. 10.)
11. Following receipt of comments on the Final Report from the Department, Russell withdrew the Final Report on May 11, 2006. (Stip. 11.)
12. On April 15, 2008, Russell submitted a new NIR. (Stip. 12.)
13. Notice of the 2008 NIR was published in the *Pennsylvania Bulletin* on May 24, 2008. (Stip. 13.)

14. On September 2, 2008, Russell submitted a new Final Report pursuant to Act 2 for a portion of the property. (Stip. 14.)

15. Through its Final Report, Russell sought only a release of liability under Act 2 for soils on a portion of the property. Russell did not seek a release of liability under Act 2 for groundwater. (Stip. 15.)

16. The entire property consists of approximately four acres. The portion of the property for which Russell sought a release of liability for soils is approximately 0.9 acres. (Stip. 16.)

17. On October 17, 2008, the Department approved the Final Report. (Stip. 17.)

18. On November 14, 2008, Epstein appealed the Department's approval of the Final Report. (Stip. 18.)

19. Epstein communicated to the Department his concerns regarding potential releases of regulated substances at the property throughout the time period that the Department was reviewing submissions by Russell pursuant to Act 2. In addition, Epstein requested that the Department interview former employees from the site, as well as neighbors and public officials who had knowledge of the site. (Stip. 19.)

20. The release of liability obtained by Russell as a result of the Department's approval of the Final Report applies only to soils at the property for the specific substances identified in the Final Report. (Stip. 20.)

#### **Additional Findings of Fact**

21. The Department adequately reviewed, considered, and responded to comments submitted to it regarding the Final Report including those provided by Epstein. (Notes of Transcript page ("T.") 26\* 44-46, 58, 71-80; Joint Exhibit Numbers ("Ex.") 4-8.)

The narrative summary of the Final Report provides in part as follows:

On behalf of the property owner, Russell Standard Corporation, CMX has prepared a Final Report for the 4-acre property located at 4010 McIntosh Road, Lower Paxton Township, Dauphin County, Pennsylvania.... The property was historically used as a paving company since the 1950s. Soil has been impacted by petroleum-related constituents that are associated with the petroleum products, such as asphalt emulsions, that were historically used and stored by the paving company. The petroleum products were likely used as part of the generation and handling of asphalt paving materials at the property. This Final Report demonstrates that soil in the characterized and remediated areas at the former paving company portion of the property attains a combination of residential and nonresidential Act 2 Statewide Health Standards. Act 2 liability relief for groundwater at the property is not being pursued at the time.... The operational footprint of the former paving company, which is located in the larger, northern portion of the property, is the portion of the property where Act 2 liability relief is being pursued, and will be herein referred to as the "Site". This Site area is generally where the two main building strips and the paved areas of the former paving company are still present at the property.... CMX characterized the Site during several phases of investigation since 2004. Site characterization activities consisted of 38 test borings, six (6) test pits, four (4) soil gas sampling points, and two (2) groundwater samples.... Petroleum-related constituents, including both volatile organic compounds (VOCs) and semivolatile organic compounds (SVOCs), were detected in some of the soil samples.... Staining, odors and photoionization detector (PID) readings also indicated petroleum-related impacts in Site soil. In general, three impacted areas were identified which included 1) a hot spot area within a concrete stall where benzene and dibenzofuran were detected above Statewide Health Standards in soil, herein referred to as the Stall Area, 2) the Central Paved Area where somewhat ubiquitous petroleum impacts were detected at generally shallow depths at concentrations below nonresidential Statewide Health Standards, and 3) the Slope Area between the northern building strip and the upper level of Site where petroleum impacts were detected below nonresidential Statewide Health Standards. These three general impacted areas of the Site encompass approximately 0.9 acres.... The Stall Area was the only analyzed area where detected soil constituents were at concentrations above nonresidential Statewide Health Standards. At boring B-22 (sample S-17) in this area, benzene was detected at a concentration of 1.08 milligrams/Kilogram (mg/Kg) and dibenzofuran was detected at 1.57 mg/Kg, which both exceeded

their similar nonresidential and residential Medium Specific Concentrations (MSC) of 0.5 mg/Kg. The source of release in this area was likely associated with the former above-ground tanks that were historically present above and near this area. The Benzene Exceedance Area soil was remediated by over-excavating the impacted soil and disposing it off-site. In July 2007, 107 tons of impacted soil were excavated, stockpiled, and later transported off-site for disposal at a soil treatment facility. Immediately following the soil excavation, post-excavation attainment soil samples were collected. The results of these attainment soil samples show that concentrations in the remaining soil was well below residential.... With the exception of the Stall Area, the site characterization data shows that the other investigated Site areas attain a combination of residential and nonresidential Statewide Health Standards. The analyzed soil samples collected in these other Site areas were all below nonresidential MSCs. Of these samples, benzo(a)pyrene was the only constituent to exceed its residential MSC (but it was below its nonresidential MSC). A deed acknowledgement is proposed to document where benzo(a)pyrene exceeds its residential MSC at the sampling locations UST-1, B-14, B-15, and TP-4. This Final Report also shows that the potential ecological impact associated with the identified Site impacts is acceptable in accordance with the Ecological Screening Process under the Act 2 Statewide Health Standard. This Final Report also shows that the risk of vapor intrusion under a nonresidential scenario is also acceptable based on soil gas sampling data and evaluation in accordance with Act 2 vapor intrusion guidance.

(Ex. 1.)

23. The Department, using well-qualified professionals, conducted an investigation sufficient to support its conclusion that the Final Report should be approved. (T. 37, 42-46, 67-68, 71-80; Ex. 6.)

24. The release from liability given by the Department to Russell as part of the Department's approval of the Final Report only applies to "the substances identified and remediated to an Act 2 standard within the site(s) specified." (Ex. 3.)

25. Because Russell's cleanup only attained a Non-Residential Statewide Health Standard for two substances (benzo(a)pyrene (soil), benzene (soil gas sampling)), the



Department required Russell to execute and record an environmental covenant in accordance with the Uniform Environmental Covenants Act, 27 Pa.C.S. § 6501 *et seq.* ("UECA"). (Ex. 3.)

26. The Department in its approval letter cautioned Russell as follows:

Although remediation under Act 2 is now complete for this site, you are advised that any future earth disturbance or development may require either approvals or permits from the appropriate county soil conservation district. Therefore, you should contact the conservation district before engaging in any such activities. In addition, soil from this site should not be used on residential properties unless it meets the Department's Management of Fill policy.

(Ex. 3.)

27. Russell has not by virtue of the approval of the Final Report been released from liability for any surface water or groundwater contamination, for any soil contamination not specifically identified in the Final Report, or for any area of the site that was not actually included in the site study and remediation. (T. 35, 39-41,44; Ex. 1,3.)

28. Epstein does not contend that Russell's sampling results are wrong or that Act 2 standards have not been attained in accordance with the representations set forth in the Final Report. (T. 32.)

29. The Department's approval of the Final Report was performed in compliance with all applicable requirements and was lawful and reasonable. (T. 43, 79-80.)

## **DISCUSSION**

Mr. Epstein does not challenge the Final Report as far as it goes. He specifically acknowledged that he has no basis for questioning the sampling in the report or the attainment of the Act 2 standards as described in the report. (Finding of Fact ("FOF") 28.) Instead of challenging the report per se, Epstein's basic position is that Russell's investigation and possibly its cleanup did not go far enough. Thus, he argues that there might be more surface water or

groundwater contamination on or near the site. He argues that soil contamination might go beyond the portion of the site covered by the Final Report. He thinks that other contaminants might be present. He contends that the Department's review of the Final Report was inadequate because it was conducted by two Licensed Professional Geologists, neither of whom is a "forensic anthropologist." In his view, the Department should have conducted a public meeting and sought out people who formerly worked on the site or other people with historical knowledge.

Epstein goes on to posit several arguments that relate to his concern that residential development is or will take place in the vicinity of the site. He argues that the Department should not have allowed Russell to clean up benzene and benzo(a)pyrene to meet only a nonresidential standard. The Department in his view should reopen the liability release afforded by the letter approving the Final Report because of the residential development. At a minimum, the Department should "actively monitor" the site after approving the Final Report to see if residential development occurs. Due presumably to the purported residential development, Epstein sees the Department's approval as inconsistent with the UECA and the Pennsylvania Municipal Planning Code, 53 P.S. § 10101 *etseq.*

None of Epstein's arguments have any merit. We start by pointing out that Epstein has not presented *any* evidence of *actual* contamination beyond that which was identified in the Final Report. Epstein's case is built upon unfounded speculation and conjecture. A party who challenges the Department's approval of a final report submitted pursuant to Act 2 bears the burden of proof. 25 Pa. Code § 1021.122(c). The appellant must show by a preponderance of the evidence that the Department erred in approving the report. *See Schiberl v. DEP*, EHB Docket No. 2008-275-L, slip op. at 5 (Adjudication, March 8, 2010). Epstein presented no

evidence of a technical or substantive nature. His case consisted of reading a prepared statement of his own into the record and brief cross-examination of two Department witnesses, which focused on process-type questions that gave no inkling that there are any actual problems at the site. In contrast to Epstein's lack of evidence, expert or otherwise, the Department presented the credible testimony of two experienced Licensed Professional Geologists that Russell conducted a thorough and competent review, and the record demonstrates that the Department's regulatory oversight was equally thorough and competent as well. There is simply no basis for believing that there is anything wrong with the Final Report or the Department's approval thereof.

The Department's role when it receives a final report is to verify that all Act 2 requirements have been satisfied and that the report adequately demonstrates attainment with Act 2 standards. 35 P.S. §§ 6026.304(h)(3), 6026.501. The Department's role is not to conduct an independent site investigation when a party submits a final report. To the extent Epstein's arguments can be interpreted as an attack on the sufficiency of the investigation precedent to the approval of the Final Report, there is simply no evidence to back up the charge.

Act 2 establishes a wholly voluntary cleanup program. 35 P.S. § 6026.301. A party is given wide latitude in picking the scope of the liability release that it wishes to obtain. By the same token, the release from future cleanup liability that accompanies the Department's approval of a final report only extends to the area, media, and contaminants that the remediating party selects and that are identified in the report. 35 P.S. § 6026.501(a). If Epstein's fears of unknown problems are ever realized, the approval of the report will not insulate any party from any

liability that may be associated with areas, media, or contaminants that were not identified in the report. *Id*}

Epstein's driving concern<sup>3</sup> seems to be that the site is not suitable for residential development that may take place on or near the site. We have no credible record evidence regarding this alleged development, but assuming it is occurring or will occur, the approval of a final report under Act 2 does not in and of itself "authorize" any development, residential or otherwise. A liability release based upon a non-residential standard does not release liability associated with residential use.<sup>4</sup> An Act 2 release does not preempt, supersede, or nullify any land development requirements. 35 P.S. § 6026.306. The Final Report in no way "subverts and usurps" the local municipality's ability to enforce zoning regulations and control land use. Furthermore, Epstein has not provided us with any support for his conclusory allegations that the Department's approval of Russell's Final Report somehow violated the "letter and spirit" of the UECA<sup>5</sup> or the Municipal Planning Code, 53 P.S. § 10101 *et seq.*, as amended by Acts 67 and 68.<sup>6</sup>

<sup>2</sup> Of course, if the Department learns of a situation that needs to be addressed at the site in the course of its oversight of an Act 2 cleanup that is outside the scope of the cleanup, the Department can refer a site to another program and that program may take further action pursuant to other statutes, 35 P.S. § 6026.905, but that would transpire outside of the Act 2 process.

<sup>3</sup> Epstein's personal interest in this matter has never been explained. He frames his arguments in relation to the residents of any future development in the area but he has no apparent connection to such a development. Nevertheless, the Department has not challenged Epstein's standing.

<sup>4</sup> The Department may approve a future request to change the land use of a site to residential if the site is shown to meet all applicable cleanup standards for residential use of the property. 35 P.S. § 6026.903.

<sup>5</sup> The UECA, 27 Pa.C.S. § 6501 *et seq.*, was signed into law on December 18, 2007. The UECA was based on a national model act developed by the National Conference of Commissioners on Uniform State Laws. The UECA provides for the creation of environmental covenants to ensure the long-term stewardship of activity and use limitations on property remediated under Act 2 or the Storage Tank and Spill Prevention Act, 35 P.S. § 6021.101 *et seq.* These limitations are restrictions on the use of the remediated property or the maintenance of a structure needed to control the movement of regulated substances through the environment. The environmental covenant is a property interest with a holder and is capable of being transferred and may be enforced by multiple parties, including the Department. The environmental covenant is recorded with the county recorder of deeds where the property is located, giving future landowners and developers notice of the activity and use limitations. *See generally*,

Epstein argues that the Department should now reopen the liability release and that it should order Russell to take further action because of the allegedly pending residential development. It is true that Section 505 of Act 2 allows the Department to reopen a final report approval and require a person to undertake additional remediation actions in limited and defined circumstances, including a case where there are substantial changes in exposure conditions at a site. 35 P.S. § 6026.505. However, as previously mentioned, Epstein has not shown that there are or will be any such change. Furthermore, the Board's role in reviewing a Department action is necessarily circumscribed by the Department action that has been appealed. *Winegardner v. DEP*, 2002 EHB 790. The Department action being appealed here is its approval of the Final Report, not an alleged decision by the Department after that approval not to conduct additional site investigations or to invoke Act 2 reopeners.

Preamble, 25 Pa. Code Chapter 253 (proposed), 40 Pa. B. 1379 (March 6, 2010). There is no basis in the record to support Epstein's argument that the Department's action was in any way inconsistent with the UECA. To the contrary, the Department specifically required Russell to prepare and record a covenant pursuant to the Act. (FOF 25.)

<sup>6</sup> "The Municipalities Planning Code was amended in June of 2000 to include provisions which require state agencies after August 22, 2000 to give consideration to local land use controls when undertaking certain actions such as permitting:

State agencies shall consider and may rely upon comprehensive plans and zoning ordinances when reviewing applications for the funding or permitting of infrastructure or facilities.

This amendment is commonly referred to as 'Act 67/68.' Prior to the enactment of Acts 67 and 68, the Department had no authority to base a permitting action upon local land use regulation. The legislation was part of an initiative by the Commonwealth to be more sensitive to local decision-making relative to land use and zoning." *County of Berks v. DEP*, 2005 EHB 233, 268-69. Epstein again fails to give us any reason to believe that Acts 67 and 68 apply to the approval of final reports under Act 2, and if so, how or why the Department's action in this case was inconsistent with those statutory amendments.

## **CONCLUSIONS OF LAW**

1. The Board has jurisdiction over the parties and the subject matter of this appeal.
2. Epstein has the burden of proof in this appeal.
3. To sustain the burden of proof, Epstein must show by a preponderance of the evidence that the Department abused its discretion because its action was not reasonable, supported by the facts, or in accordance with law.
4. The approval of a final report submitted pursuant to Act 2 does not insulate a party from any liability associated with areas, media, or contaminants that are not identified in the final report.
5. The Department acted reasonably and lawfully in approving Russell's Final Report.

**COMMONWEALTH OF PENNSYLVANIA  
ENVIRONMENTAL HEARING BOARD**

**ERIC JOSEPH EPSTEIN**

**v.**

**EHB Docket No. 2008-319-L**

**COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF ENVIRONMENTAL  
PROTECTION and RUSSELL STANDARD  
CORPORATION**


**ORDER**


AND NOW, this 30<sup>th</sup> day of April, 2010, it is hereby ordered that Epstein's appeal is dismissed.

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWANb  
Chairman and Chief Judge**

  
**MICHELLE A. COLEMAN**  
Judge

  
**BERNARD A. LABUSKES, JR.**  
Judge

  
**MICHAEL L. KRANCER**  
Judge

**RICHARD P. MATHEfi, SR.  
Judge**

**DATED: April 30,2010**

**c: DEP, Bureau of Litigation:**

Attention: Connie Luckadoo

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